Supreme Court, U.S.
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No. 95-957

In the Supreme Court of the United States

OCTOBER TERM, 1995

ERNEST BRAZIL, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether a federal employee may obtain judicial review, under Title VII of the Civil Rights Act of 1964, of the revocation of his security clearance by the Department of the Navy.

2. Whether a civilian employee of the Department of the Navy may bring a *Bivens* action based on the allegedly discriminatory revocation of his security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 66 F.3d 193. The order of the district court (Pet. App. 15a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1995. The petition for a writ of certiorari was filed on December 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a civilian, was employed as a wiper (janitor) with Military Sealift Command, Pacific (MSCPAC), and was assigned to USNS Kilauea. Because the Kilauea is certified to carry nuclear weapons, all crew members must be certified under the Nuclear Weapon Personnel Reliability Program (PRP), which is designed to assure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons and nuclear components. "[O]nly those personnel who have demonstrated unswerving loyalty, integrity, trustworthiness and discretion of the highest order" will be certified under the PRP, and employees once certified are also subject to "continuous evaluation * * * and prompt removal" if they no longer meet the high standards prescribed. See Pet. App. 41a-42a (quoting OPNAVINST 5510.162(5)).[1]

The factors considered and standard applied in a PRP certification are essentially the same as those

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[1] The Master of the Kilauea also noted, in a declaration, that the Kilauea, as the only MSCPAC ship certified to tranship nuclear weapons, is "the only MSCPAC ship with a reaction force made up of crew members, who routinely arm themselves with various loaded weapons." Armed crew members are on duty at all times, and deadly force is authorized in the protection of the safety and security of nuclear weapons. The environment aboard the Kilauea is therefore "considerably more stressful than that which exists on any other ship." C.A. E.R. 29. The master believed that "the tension and stress aboard the Kilauea could exacerbate any tendencies toward erratic behavior a person may have. That is why the crew is so thoroughly screened both before and during their employment." *Id.* at 31.

applied in the process of a security clearance. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 528-529 (1988). Criteria such as emotional stability, sound judgment in meeting emergency situations, and freedom from drug and alcohol abuse are considered in evaluating an individual's reliability. See MCCPAC Nuclear Weapons Management Manual §§ 4-100 to 4-102 (C.A. E.R. 23-26). The factors in each employee's case must be evaluated to determine whether a PRP certification would be "clearly consistent with the interest of national security," and because of the factors necessary for that certification, "[m]any individuals, though not disqualified for service generally, nevertheless may be considered unsuitable to hold a 'high risk' position." *Ibid.*

2. Petitioner had been PRP certified and aboard Kilauea for just over two months when the first in a series of disciplinary and legal problems occurred. On February 12, 1989, he was apprehended at the main gate of the Subic Bay, Philippines, base for attempting to exit with excessive tax-free items, in violation of merchandise control regulations. Petitioner was reprimanded and his tax-free privileges were suspended for six months. Pet. App. 42a-43a; C.A. E.R. 65.

A few weeks thereafter, local authorities in the Philippines brought charges against petitioner, alleging sexual misconduct with a Filipino minor. The charges were subsequently dismissed, with a finding that petitioner had not deceived the minor by promising marriage, Pet. App. 43a, "after an unconfirmed cash payoff," *id.* at 40a.

On May 9, 1989, petitioner and another Kilauea crew member, Roger Olaes (an Asian/Pacific Islander male), became involved in a physical altercation off

the ship in the city of Olongapo, in the Philippines. The disturbance required the intervention of the Olongapo City authorities and United States military police. Pet App. 39a. The Master of the Kilauea, Captain Bruce Butterfield, reprimanded both petitioner and Olaes. *Id.* at 28a, 43a.

Petitioner then attempted to "press[] charges" with Captain Butterfield against other crew members. C.A. E.R. 30; Pet. App. 44a. Captain Butterfield explained to petitioner that, on board ship, only the Master could file "charges," but he informed petitioner of his right to file a grievance, and he attempted to explain how to do so. C.A. E.R. 38-39. Petitioner then became confrontational and accused Captain Butterfield of engaging in a "cover up." *Id.* at 40.

On May 18, 1989, Captain Butterfield concluded, in light of petitioner's serious problems during his short time aboard the Kilauea, that petitioner did not meet the PRP reliability standards. "The crux of the matter," according to Captain Butterfield, was that petitioner was "potentially dangerous in dealing with arms [and] explosives," as he had been involved in "several questionable incidents where his behavior was gener-ally hostile, erratic and sometimes abusive." C.A. E.R. 28.[2] Accordingly, Captain Butterfield paid peti-tioner off the ship, repatriated him to the United States, and recommended his decertification from the PRP. Petitioner was

[2] Captain Butterfield also noted, in addition to the problems mentioned in the text, that petitioner was given "to wild ramblings and verbally abusing other [crew members]," and he was concerned that if crew members "had to watch out all the time for [petitioner], they would be less able to pay attention to what they were doing on the job." C.A. E.R. 31.

decertified from the PRP on October 3, 1989. *Id.* at 31, 65.

3. Petitioner filed a discrimination complaint with the Navy's equal employment opportunity officials, alleging that his repatriation from the Kilauea was the result of discrimination on the basis of his race (African-American) and color (black). The initial examiner recommended a finding of racial discrimination. Pet. App. 56a-68a. The Navy, however, rejected that recommendation and issued a disposition finding Captain Butterfield's articulated reasons for repatriation to be legitimate and non-discriminatory; the Equal Employment Opportunity Commission (EEOC) affirmed the Navy's conclusion that the repatriation was not discriminatory. *Id.* at 37a-55a.

4. Petitioner then brought this Title VII action against the Secretary of the Navy and the Department of the Navy in district court, alleging that the Navy discriminated against him on the basis of race when it repatriated him from the Kilauea. See C.A. E.R. 1-3. Petitioner did not name Captain Butterfield as a defendant, nor did he plead a cause of action arising under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

On the Navy's motion for summary judgment, the district court concluded that it did not have "the power under Title VII to review the merits of the [Navy's] decision" to revoke petitioner's PRP certification. Pet. App. 31a. Although petitioner had filed only an employment discrimination complaint under Title VII, the court also concluded (*id.* at 32a-33a) that petitioner could not challenge the merits of his decertification by bringing "a constitutional claim against a superior officer or against the Department of the Navy."

5. The court of appeals affirmed.[3] Pet. App. 1a-14a. It concluded that this Court's decision in *Egan*, *supra*, and its own subsequent decision in *Dorfmont* v. *Brown*, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991), "preclude judicial review of security clearance decisions made by the Executive or his delegee." Pet. App. 6a. The court read *Egan* and *Dorfmont* as indicating that the usual presumption of judicial review of agency action "is negated when it conflicts with national security concerns." *Id.* at 7a. It also stressed that security clearance decisions, which are "heavily dependent on the ability of the decision-maker to predict the future behavior of the applicant," involve " 'sensitive and inherently discretionary' exercises" in predictive judgment that must be made by experts in the Executive Branch, rather than an "outside nonexpert body" (*ibid.*).

The court's analysis of the process for adjudication of Title VII claims under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), convinced it that it could not review petitioner's discrimination claim without also engaging in a review of the merits of the decertification itself. Pet. App. 8a-9a. The court noted that, under *McDonnell Douglas*, once petitioner made out a prima facie case of discrimination, the burden would shift to the Navy to provide legitimate, nondiscriminatory reasons for its actions, and that, after those reasons were provided, the burden would shift back to petitioner to establish that those supposedly legitimate reasons were, in fact,

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[3] Petitioner appealed *pro se*, but after initial briefing, the court of appeals appointed counsel for him and received supplemental briefing from all parties. C.A. E.R. 154.

pretexts for unlawful discrimination. *Id.* at 8a. The court then stated:

> The second and third steps of the Title VII analysis present an insurmountable hurdle for [petitioner]. It is impossible for the court to establish in the first place whether the Navy's proffered reasons were legitimate without evaluating their merits. Even if the court were able to get by step two, it is very likely to be impossible for it to proceed to step three and determine whether the given reasons were mere pretext without considering their merits.

Pet. App. 9a. Accordingly, the court held that it could not review petitioner's decertification from the PRP program under Title VII. *Ibid.*

Despite petitioner's failure to plead a *Bivens* claim, the court ruled that *Bivens* actions are not available "where the claim involves employment discrimination and the plaintiff is a civilian employee of the military." Pet. App. 10a-11a. The court noted that, in *Brown* v. *General Services Administration*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." The court acknowledged that, under *Davis* v. *Passman*, 442 U.S. 228 (1979), congressional employees, who at that time were not covered by Title VII, could bring *Bivens* actions based on the equal protection component of the Fifth Amendment. It found *Davis* inapposite, however, because, unlike the congressional employees in *Davis*, civilian employees of the military are "covered by the 'massive and complex program' of Title VII in all areas of discrimination *except* for

that relatively narrow area dealing with security clearance decisions." Pet. App. 11a.

ARGUMENT

1. Petitioner contends that, under Title VII of the Civil Rights Act of 1964, the courts may review the Navy's revocation of his PRP certification—an action akin to the revocation of a security clearance—to decide whether the Navy engaged in unlawful discrimination in doing so.[4] The court of appeals' decision to the contrary is consistent with the decisions of the other two courts of appeals that have considered that issue, and it does not conflict with any decision of this Court. Further review is therefore not warranted.

a. Both lower courts in this case, and the other courts of appeals that have considered the Title VII issue presented, found guidance in this Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988). In *Egan*, the Court held that Congress had not authorized the Merit Systems Protection Board (MSPB) to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse federal personnel action. The text of the statute at issue in that case, 5 U.S.C. 7512, neither expressly authorized nor expressly precluded appellate administrative review of

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[4] As noted above, a PRP certification is like a security clearance determination in that both determinations (i) directly implicate national security concerns, and (ii) apply the "clearly consistent with the interest of the national security" standard. See *Egan*, 484 U.S. at 528-529; C.A. E.R. 26. In the courts below, the parties agreed that the decertification should be treated as the equivalent of a revocation of a security clearance. Pet. App. 4a n.1.

an agency's denial of a security clearance, and the respondent contended that the absence of express preclusion "create[d] a strong presumption in favor of appellate review." 484 U.S. at 526. The Court rejected that argument; it stated that while, as a general matter of administrative law, there may indeed be a presumption of appellate review of agency action, that proposition "runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 526-527.

The Court also observed that "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official" (484 U.S. at 528), and that the decisionmaking involved is "an inexact science at best" (*id.* at 529). Because "[p]redictive judgment[s] of this kind must be made by those with the necessary expertise, * * * it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk." *Ibid.* Accordingly, "unless Congress has specifically provided otherwise," courts should be reluctant to intrude on the authority of the Executive Branch to grant or deny security clearances. *Id.* at 530.

b. Relying on *Egan*, the courts of appeals have, thus far, unanimously concluded that Congress did not intend courts to review revocations of individual security clearances in the context of Title VII liti-

gation. As did the courts below, the Fifth Circuit recently concluded that Title VII does not authorize judicial review of security clearance determinations. *Perez* v. *FBI*, 71 F.3d 513 (1995). In that case, which involved an allegation of a retaliatory revocation of a security clearance, the FBI proffered evidence, at the second stage of the *McDonnell Douglas* scheme, that the plaintiff's clearance was terminated for legitimate, non-discriminatory reasons. The Fifth Circuit noted that, "[i]n the ordinary Title VII situation, that would put the ball in [the plaintiff's] court to show pretext," but that, "[b]ecause the court would have to examine the legitimacy and the possibly pretextual nature of the FBI's proffered reasons for revoking the employee's security clearance, any Title VII challenge to the revocation would of necessity require some judicial scrutiny of the merits of the revocation decision." *Id.* at 514 (footnotes omitted). The court quoted *Egan* for the proposition that " '[p]redictive judgments of this kind' properly are left to 'those with the necessary expertise in protecting [the sensitive material,]' rather than in the hands of 'an outside nonexpert body' or the equally nonexpert federal courts." *Id.* at 514 n.6.

In considering a claim of discrimination based on disability under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, which parallels much of Title VII, the Fourth Circuit also relied on *Egan* to conclude that it could not review the Navy's revocation of the plaintiff's security clearance. *Guillot* v. *Garrett*, 970 F.2d 1320 (4th Cir. 1992). After considering at length the statements in *Egan* that appellate bodies do not have authority to review security clearance decisions unless "Congress *specifically* has provided otherwise," *id.* at 1324, the court stated,

"[w]e can discern * * * no more an expression of congressional intent in the provisions of the Rehabilitation Act or the Civil Rights Act of 1964 than in section 7513 of title 5 that the Executive's security clearance decisions be reviewable by the MSPB or by federal courts on appeal." 970 F.2d at 1325.

The courts of appeals that have considered the question have thus been unanimous in concluding that the merits of individual security clearance decisions are not reviewable by courts under Title VII.[5] They have reached similar conclusions about judicial review of security clearance denials under other statutes and in other contexts.[6]

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[5] Petitioner's contention (Pet. 9-11) that the decision below conflicts with *South Dakota* v. *Bourland*, 508 U.S. 679 (1993), *McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995), and *Davis* v. *Passman*, 442 U.S. 228 (1979), is incorrect. None of those cases arose in the national security context, and therefore none involved the concern about "outside nonexpert" review of security clearance decisions.

[6] In *Dorfmont* v. *Brown*, 913 F.2d 1399 (1990), cert. denied, 499 U.S. 905 (1991), the Ninth Circuit affirmed the dismissal of a suit by an employee of a defense contractor, who challenged the revocation of her security clearance on due process grounds. Accord *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1409 (10th Cir.), cert. denied, 488 U.S. 825 (1988).

In *Dubbs* v. *CIA*, 866 F.2d 1114 (1989), the Ninth Circuit held that the plaintiff could not challenge the denial of her security clearance under the Administrative Procedure Act, although she could pursue a colorable constitutional challenge to that denial, which was alleged to be based on her sexual orientation, under equal protection principles.

The D.C. Circuit held in *United States Information Agency* v. *Krc*, 905 F.2d 389 (1990), that the Foreign Service Act does not give the Foreign Service Grievance Board jurisdiction to review the decision of a security program manager to withdraw a foreign service officer plaintiff from overseas

2. Petitioner also urges (Pet. 20-24) this Court to decide whether courts may entertain a challenge under *Bivens*, based directly on the equal protection component of the Fifth Amendment, to the revocation of a security clearance. Petitioner did not plead a *Bivens* claim in his complaint, which was a form complaint for Title VII cases. See C.A. E.R. 1-3. Moreover, he named, as defendants, only the Department of the Navy and the Secretary of the Navy—the latter in his official capacity as the agency head required to be named as the party defendant in Title VII litigation against a federal agency. See 42 U.S.C. 2000e-16(c); Pet. App. 55a (EEOC right to sue notice). A *Bivens* action may not be brought against a federal agency, see *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004-1006 (1994), and the same rule logically applies to actions brought against federal officials in their official capacities, see *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985).[7]

In all events, the court of appeals' decision (Pet. App. 10a-12a) that a *Bivens* action is not available to challenge the revocation of a security clearance of a civilian employee of the military is consistent with the decision of the Fifth Circuit in *Perez* v. *FBI*, *supra*, the only other appellate decision that has addressed the matter. In the decision below, the court of appeals concluded (Pet. App. 11a) that petitioner's *Bivens* action was precluded by *Brown* v. *General Services Administration*, 425 U.S. 820, 835 (1976),

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postings, and that the court also did not have authority under the Administrative Procedure Act to review the decision.

[7] There is no suggestion in the petition, or in any of the papers presented to the lower courts, that the Secretary of the Navy was personally involved in petitioner's case.

which held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." In *Perez*, the Fifth Circuit held, for the same reason, that a *Bivens* action is not available for discrimination claims. The Fifth Circuit concluded that the district court had "correctly relied on Supreme Court and Fifth Circuit precedent to the effect that Title VII provides the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination," 71 F.3d at 515, and it cited *Brown* for that proposition, *id.* at 515 n.8.

Contrary to petitioner's contention (Pet. 21-22), the decision below does not conflict with *Davis* v. *Passman*, 442 U.S. 228 (1979). *Davis* involved a congressional employee who (unlike petitioner) was at the time excluded entirely from the protection of Title VII and had no statutory remedy at all (in damages or otherwise) for employment discrimination. The court of appeals concluded that, in the present situation, unlike that in *Davis*, "Congress has designed a program that provides what it considers adequate remedial mechanisms for constitutional violations, [and] *Bivens* action[s] should not be implied." Pet. App. 11a.

Petitioner also seeks support from *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), in which the Court held that Congress had not foreclosed the courts from reviewing a "colorable constitutional claim[]" that the respondent in that case was discharged from the Central Intelligence Agency on the basis of sexual orientation. *Webster*, however, was a suit for reinstatement, not a *Bivens* action for damages; the complaint in that case did not request damages from

any individual federal official. *Id.* at 596-597.[8] Although (as petitioner notes, Pet. 19) the Court stated in *Webster* that claims "attacking the hiring and promotion policies of the [CIA]" were already being heard by the federal courts, those claims do not necessarily involve the revocation or denial of a security clearance.

3. We also note that the President has recently established an administrative remedy for claims of discrimination in security clearance decisions. On August 2, 1995, the President issued Executive Order 12,968, which states that "[t]he United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information." Exec. Order No. 12,968, § 3.1(c), 60 Fed. Reg. 40,250 (1995). The Order provides for administrative review of revocations and denials of security clearances; it also provides that an employee who has received an adverse security clearance decision must be given a statement of reasons for the decision, and has the right to respond, the right to representation by counsel, and the right to appeal to a high-level panel within the agency. § 5.2, 60 Fed. Reg. 40,252 (1995).

Although the actions here preceded the issuance of Executive Order 12,968, petitioner had the benefit of similar administrative safeguards. He was provided with a statement of reasons for Captain Butterfield's

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[8] The courts below addressed only whether petitioner could bring an action for damages against his superiors. The case does not raise, and we do not address, the question whether any equitable cause of action under the Constitution might be available.

recommendation that he be decertified. He availed himself of the opportunity to respond to those reasons, and a final decision regarding decertification was made by officials other than Captain Butterfield. Although the EEOC did not directly review the decertification decision, it concluded that Captain Butterfield's decision to repatriate petitioner from the ship was not tainted by discrimination. Pet. App. 37a-55a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

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